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No. 1114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

AMERICAN OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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For The Fifth Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, American Oil Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on October 3, 1969, as amended on November 28, 1969.

OPINIONS BELOW

The United States District Court for the Southern District of Texas dismissed the consolidated salvage claims of the United States against the American Oil Company on

February 26, 1968. (R. A. 596-597)[1] The United States Court of Appeals for the Fifth Circuit reversed the decision of the trial court on October 3, 1969. (App. A of Petition) The American Oil Company's petition for rehearing was denied on October 28, 1969 (App. C of Petition), and the judgment of the Fifth Circuit was amended on November 28, 1969. (App. D of Petition)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Is the United States entitled to recover a salvage award for the expenses incurred by the United States in the furnishing of supplies and services by the Air Force and Navy to the United States Coast Guard at the Coast Guard's request, when the Coast Guard is performing its authorized function and duty of saving lives and property on the navigable wafers of the United States?

STATUTES AND REGULATIONS INVOLVED
(App. E of Petition)

1. 14 U.S.C., Sections 2 and 88.

2. 33 C.F.R. § 6.04-11, p. 65

3. Executive Order 10173, 15 F. R. 7005 (October 20, 1950)

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[1] The record below consists of three volumes, the last of which is an exhibit volume that is independently paginated. Reference to relevant matters contained in the first two volumes will be made herein by the abbreviation: "R. A.", followed by the page number in which the reference appears. Reference to exhibits contained in the exhibit volume will be made according to the page at which they appear therein, preceded by the abbreviation; "Ex. Vol."

STATEMENT OF THE CASE

The factual background of this case is succinctly summarized by the Fifth Circuit:

> "The S.S. AMOCO VIRGINIA was a steel hulled tank vessel of about 12,527 gross tons, approximately 571 feet in length owned by the American Oil Company. Just after midnight on Sunday, November 8, 1959 she was moored to the dock of the Hess Terminal Corporation, in the Houston Ship Channel near Galena Park, Texas. In this berth she was loading a cargo of gasoline and heating oil. She was almost fully laden with more than six million gallons of this cargo, when a fire ignited on the surface of the water in the vicinity of her berth. The flames quickly spread surrounding the vessel and some of her barges moored alongside. One of her barges exploded, propelling flaming gasoline onto the vessel. Explosions followed in some of her cargo tanks. Fire spread over other portions of the ship, igniting portions of her cargo, and flames licked as high as her masts. Those on board the vessel were unable to fight the fire with her firefighting systems. Several crew members were killed. The vessel and her cargo lay burning out of control with grave danger of explosion. The adjacent docks stood threatened with a major disaster. The Houston Ship Channel was ordered closed by the U. S. Coast Guard. Fire departments from the City of Houston and eighteen other municipalities joined in the fight to stop the fire along with a fireboat from the Houston Navigation District, three Coast Guard picket boats assigned to the Captain of the Port, Coast Guard personnel and equipment from the Captain of the Port, and fire parties from a Coast Guard Base and from various Coast Guard vessels in Galveston, Texas, and Sabine Pass. As morning arrived, the fire fighting had exhausted the chemical foam required to extinguish a fuel fire of this sort. The foamite supply used up to this time had come from the Coast Guard, Hess Terminal Corporation, the Houston Fire Department, the Houston

Navigation District, and private industries along this area of the Houston Ship Channel. Now it was seven o'clock in the morning and the fire was almost under control. All of the chemical foam needed to fight this fuel fire was gone. Suddenly, the fire built up again, regained in power, and surpassed the intensity of the conflagration that the firefighters had conquered during the dark and dawning morning hours. A series of explosions occurred, and a new major firefighting effort was demanded. But there was no chemical foam left. The firefighters had no weapons with which to fight.

However, foam to fight was on its way. At about 7:00 A.M. the U.S. Air Force at Ellington Air Force Base sent ten 55-gallon drums of foam to the scene and another ten barrels at 9:30 A.M. The Coast Guard Houston Port Captain, with approval from the Eighth Coast Guard District office in New Orleans, bought more chemical from commercial sources. A veritable air lift was begun to bring foam into Houston through Ellington Air Force Base with the first plane in the airlift arriving at Ellington at 11:59 A.M. Later that afternoon Air Force and Navy aircraft arrived with foam at almost ten minute intervals. This foam airlift continued for seven hours, stopping at about 7:00 P.M. when the Houston Civil Defense spokesman advised no further need for foam. The fire had been brought for the second — but final — time under control. This foam airlift consisted of 47 flight, hauled more than a half million pounds of foam, involved more than 400 Air Force and Navy personnel, and used some 42 Air Force and Navy vehicles." (Appendix A of Petition)

The United States District Court for the Southern District of Texas, which had jurisdiction under the United States Constitution, Art. 3, § 2, Clause 1, expressly found that, "The foam furnished by the U. S. Air Force and Navy, and the utilization of the aircraft of these two service

branches and the air lifting of foam from other bases to Houston and the utilization of the Air Force equipment at the scene of the fire-fighting effort, *was all furnished as assistance to, and at the request of, the U. S. Coast Guard.*" (R.A. 587) Further, the trial court found that, "* * * the actions of the Air Force and Navy in furnishing assistance and supplies to help put out the fire on the SS AMOCO VIRGINIA were carried out under or pursuant to the National Search and Rescue Plan." (R.A. 588)

The District Court further held, citing an applicable Presidential Executive Order that the United States Air Force and Navy were duty bound under the facts of this case to provide assistance at Coast Guard request in combating the blaze on the SS AMOCO VIRGINIA located on the Houston Ship Channel. (R.A. 593,594) The trial court concluded that the United States was precluded from recovering an award for salvage against the American Oil Company (R.A. 593, 594, 595), and dismissed the consolidated salvage claims by the United States against the American Oil Company.

The United States Court of Appeals for the Fifth Circuit reversed. The Fifth Circuit specifically held that the salvage services rendered in this case were the acts and services of the United States Coast Guard. Therefore, the Court recognized that the expenses incurred by the Government were properly chargeable to the United States Coast Guard. However, the Fifth Circuit held that the United States was entitled to recover a salvage award for such expenses because the Coast Guard had no legal duty to render aid to distressed vessels on the navigable waters of the United States. (App. A of Petition) The Court added that although Congress had not by statute authorized the Government to sue for a salvage award on behalf of the Coast Guard, the Government could nevertheless recover a salvage award

for the expenses properly chargeable to the Coast Guard because the United States had an inherent right to do so. (App. A of Petition)

The Fifth Circuit did not dispute that under an applicable Executive Order, the Air Force and Navy were duty bound to respond to the Coast Guard's request for aid. (App. A of Petition) The appellate court stated, however, that the duty owed by the Air Force and Navy was owed not to the vessel in distress, the SS AMOCO VIRGINIA, but to the United States Coast Guard, and therefore the Government was entitled to a salvage award. (App. A of Petition)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, HOLDING THAT THE GOVERNMENT IS ENTITLED TO RECOVER A SALVAGE AWARD FOR SERVICES RENDERED BY THE UNITED STATES COAST GUARD, CONSISTING OF EXPENSES INCURRED BY THE UNITED STATES IN FURNISHING FOAM AND SERVICES TO THE COAST GUARD AT COAST GUARD REQUEST, IS IN CONFLICT WITH THE ADMIRALTY AND MARITIME LAW OF SALVAGE, WITH AN APPLICABLE DECISION OF THIS COURT, AND PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

A. Since the Acts and Services herein were the acts and services of the United States Coast Guard, the decision below is in conflict with the Admiralty and Maritime Law of Salvage and with an applicable decision of this Court.

The United States claims in this case that it seeks a salvage award only for the expenses incurred by the United States Army and Navy in furnishing foam and other serv-

ices to the Coast Guard, which on November 8, 1959, was vigorously engaged in attempting to put out a fire on the SS AMOCO VIRGINIA and the dock and waters adjacent to the vessel in the Houston Ship Channel. The Fifth Circuit, however, held:

> "We adopt the findings of the lower court and agree with the American Oil Company that *the salvage services rendered herein were the acts and services of the United States Coast Guard.* In rendering such service, however, the United States Coast Guard did solicit and receive valuable service and support from the United States Air Force and from the United States Navy, as well as from commercial sources." (Emphasis added) (App. A of Petition)

Thus, the Fifth Circuit blew away the smoke screen of military red tape thrown up by the Government and recognized that the services rendered were those of the Coast Guard, and that, therefore, the bookkeeping expenses incurred by the United States in its Army and Navy capacity in furnishing foam and other services at Coast Guard request, were expenses properly chargeable to the United States Coast Guard. Nevertheless, the Fifth Circuit held that the United States was entitled to a salvage award for the salvage acts and services of the Coast Guard on the ground the Coast Guard had no affirmative legal duty to render aid to distressed vessels on the navigable waters of the United States.

The Fifth Circuit relied on *United States* v. *De Vane*, 306 F.2d 186 (5th Cir. 1962) and *Frank* v. *United States*, 250 F.2d 178 (3rd Cir. 1957), cert. den. 356 U.S. 962 (1958). These cases are inapposite. They were not salvage cases but involved suits by private parties against the United States under the Federal Tort Claims Act, and hold only that the decision to undertake a rescue is discretionary with the

Coast Guard, and that the Coast Guard has no affirmative duty under 14 U.S.C. § 2 and § 88 (App. E of Petition) to go to the aid of distressed persons or vessels. In those cases the legal relationship of the Coast Guard to the person being rescued was held to determine the extent of the legal responsibility and liability of the United States to that person for the Coast Guard's negligence. Such cases do *not* hold that once the Coast Guard undertakes to aid distressed persons or vessels it is entitled to recover a salvage award for expenses incurred while performing its authorized functions and "permissive duties" under these statutes. The Fifth Circuit describes the Coast Guard's functions under 14 U.S.C. § 88 as *"permissive duties"*. (App. A of Petition) Prior to the Fifth Circuit's decision, no Federal court had ever held that the Coast Guard is eligible to receive a salvage award.

In order to sustain a claim for salvage, the salvor's acts must *not* have been rendered under an official duty. *Davey* v. *The Mary Frost*, 7 Fed.Cas. 11, 7 Fed.Cas. 14, No. 3,592; *The Lyman M. Law*, 122 F. 816 (D.C. Me. 1903); *Thornton* v. *The Livingston Roe*, 90 F. Supp. 342 (S.D., N.Y. 1950); Gilmore & Black, *Law of Admiralty*, Ch. VIII, p. 445; C.J.S., *Salvage*, § 32, p. 503; Norris, *The Law of Salvage*, § 68, p. 106; Norris, *The Law of Seamen*, Vol. 1, § 193, p. 211.

The Federal courts have consistently held that Coast Guard vessels (or revenue cutters) and/or their personnel are not entitled to recover salvage awards because salvage services are a normal part of their duties. *United States* v. *Towboat Co.*, 3 F.2d 250, 1925 A.M.C. 318 (1st Cir. 1924); *The Annie Lord*, 251 F.157 (D.C.Mass. 1917); *Beach Salvage Corp. of Florida* v. *The Cap't Tom*, 201 F.Supp. 479 (1961); *The Lyman M. Law, supra.*

In *The Lyman M. Law, supra,* a derelict schooner was towed to safety by a passenger ship aided by a privately owned schooner and by a Coast Guard life-saving crew. The owners of the salving vessels brought suit for a salvage award. Regarding the coast guardsmen, the Court stated at page 827:

> "In fixing the amount of salvage, we exclude, of course, the crew of the life-saving station from any award. While they rendered most valuable and effective service, they were in duty bound to do this in the performance of their duty as life-savers and under the statutes of the United States."

In *Beach Salvage Corp. of Florida* v. *The Cap't Tom, supra,* the court held:

> "The Court further finds that the Beach Salvage Corporation of Florida, the Libellant, was not the only salvor *but the United States Coast Guard was also a salvor of the vessels even though, by reason of law, it could not actually receive a portion of any salvage award,* * * *." (201 F.Supp. 485)

The general rule that the United States, acting through its Coast Guard, is ineligible to receive a salvage award for its services in saving lives and property on the navigable waters of the United States, and the waterfront facilities adjacent thereto, is succinctly stated in Norris, *The Law of Seaman,* Vol. 1, § 78, p. 126:

> "Section 78. The Coast Guard.
>
> The ineligibility to receive a salvage award by one who is not a volunteer, is best exemplified by the United States Coast Guard. This branch of the United States Government which operates under the United States Navy in time of war and the Treasury Department in time of peace is charged with the duty of aiding life and distressed property in navigable waters."

Municipal firemen are *not* entitled to an award for saving property if they are merely performing their duties. Gilmore & Black, *The Law of Admiralty*, Ch. VIII, p. 452; *Davey* v. *The Mary Frost, supra.* Can it be rightfully held that the Coast Guard should be treated differently and given an award for fire-fighting services rendered to an American vessel?

The conclusion by the Fifth Circuit that the United States is entitled to recover a salvage award is clearly erroneous and in conflict with the admiralty and maritime law of salvage.

The Fifth Circuit further held that the United States has an inherent right to seek an award for salvage, and that, therefore, the United States is entitled to sue for a salvage award for the services of the United States Coast Guard despite the absence of specific statutory authorization. This is in conflict with *United States* v. *Standard Oil Co. of California,* 332 U.S. 301 (1947). In that case, this Court held that whether the United States should be reimbursed for the damages sustained by the United States in rendering hospital and medical treatment to a soldier injured as a result of the negligent conduct of a third party was a matter of federal fiscal policy determinable by Congress, which alone might create in the government a right of reimbursement. This Court asserted that in the absence of the creation of such right, the United States could not recover. The Court in rejecting the Federal Government's contention that it was entitled to reimbursement without statutory authorization, stated at pages 314 and 315:

> "Congress, not the court or other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of the federal fiscal affairs. And these comprehend, as we have said, securing the treasury or government against financial losses, however inflicted. . . ."

Thus, under the rule of law unmistakably enunciated in *United States* v. *Standard Oil Co. of California, supra,* the United States as a general proposition in the absence of statutory authorization is not entitled to recover from third parties for expenses incurred by its governmental agencies.

In line with the 1947 *Standard Oil Co.* case, *supra,* Congress in 1958 did enact legislation authorizing claims for salvage services performed by the Air Force and Navy under proper circumstances by the Secretary of the Navy and the Secretary of the Air Force. See 10 U.S.C., § 7365 and 10 U.S.C., § 9804. But while Congress has authorized the Secretary of the Navy and the Secretary of the Air Force to make claims for salvage under appropriate circumstances for the branches of the service which they represent, it is significant that Congress has not authorized the Secretary of the Treasury nor any agency of the Government to make salvage claims arising out of Coast Guard operations.

Since the United States has no inherent right to seek an award for salvage on behalf of the United States Coast Guard, and since Congress has not by statute authorized the Government to sue for a salvage award for the Coast Guard, the holding by the Fifth Circuit in this case is clearly erroneous and in conflict with *United States* v. *Standard Oil Co. of California, supra.*

B. The Decision below is in conflict with Admiralty and Maritime Law of Salvage because the Air Force and Navy were duty bound to respond to the Coast Guard's request for aid.

The Fifth Circuit did not dispute the trial court's finding that the Air Force and Navy were duty bound to respond to the Coast Guard's request for aid. (App. A of Petition)

Such duty arose under these facts and circumstances: The Coast Guard promptly responded to the disaster on the Houston Ship Channel and assisted in the fire fighting on and around the SS AMOCO VIRGINIA and the waterfront facilities on the Houston Ship Channel with all the means available to the Captain of the Port, a Coast Guard officer. (R.A. 585, 596, 490, 279) In so doing the Coast Guard without question was carrying out one of its statutorily authorized functions and certainly one of its "permissive duties", as recognized by the Fifth Circuit. *14 U.S.C. § 2, 88.* (App. E of Petition) When Lt. Comdr. R. J. Evans, a Coast Guard officer, and Captain of the Port of Houston, made a request of the Air Force and Navy for services and supplies, such as fire fighting foam, to aid the Coast Guard in combating the blaze on the Houston Ship Channel (R.A. 585, 586, 490, 279, Ex. Vol. 56) he was acting within the authority created by Executive Order 10173 establishing "Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States". These regulations were originally set down in 15 F.R. 7005-7008 (1950). They now constitute Part 6, Subchapter A, Chapter 1, Title 33 of the Code of Federal Regulations. Subparagraph 6.04-11, p. 65 of these regulations provides:

> "The Captain or the Port may enlist the aid and cooperation of the Federal, State, county, municipal, and private agencies to assist in the enforcement of regulations issued pursuant to this part." (App. E of Petition)

In responding to the request for aid made by the U. S. Coast Guard, the Air Force and Navy were acting within the scope of their authorized functions and duties. By presidential directive all Federal agencies are ordered to assist in the enforcement of the regulations which authorized the Coast Guard Captain of the Port to fight the fire

on the Houston Ship Channel. The presidential decree is set forth in Executive Order 10173 which is contained in 15 F.R. 7005 (October 20, 1950) and reads in part as follows:

> ". . . I hereby prescribe the following regulations relating to safeguarding against destruction, loss, damage . . . accidents, or other causes of similar nature, of vessels, harbors, ports, and waterfront facilities in the United States, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, . . . *and all agencies and authorities of the government of the United States shall* . . . support, conform to, and assist in the enforcement of these regulations and all supplemental regulations issued pursuant thereto." (Emphasis added) (App. E. of the Petition)

This executive order directed the Air Force and Navy to provide assistance to the Coast Guard Captain of the Port upon request.

Furthermore, the National Search and Rescue Plan (SAR) was placed into operation by the Coast Guard in this case to provide an overall rescue of the SS AMOCO VIRGINIA (R.A. 588) and to avert a major catastrophe to the Port of Houston. Accordingly, the Air Force and Navy were authorized to, and they did, come to the assistance of the Coast Guard under the SAR plan. The Air Force and Navy were authorized under the SAR plan of organization to utilize its facilities "to the maximum extent feasible" (Ex. Vol. 69), to the extent such action did not interfere with the military mission of such armed forces.

Accordingly, by virtue of the executive order of the President of the United States directing all agencies and authorities of the government of the United States to support

and assist in the enforcement of the above-mentioned regulations, and because the Coast Guard and the Captain of the Port of Houston requested such aid and assistance from the United States Air Force and Navy pursuant to these regulations, and by virtue of the fact that the National Search and Rescue Plan was placed into operation by the Coast Guard, it is crystal clear that the Fifth Circuit was correct in recognizing that the Air Force and Navy were acting under an official duty when they responded to the Coast Guard's request for aid.

The Fifth Circuit, however, held that the Government was entitled to a salvage award for the expenses incurred by the Air Force and Navy, on the ground that the duty owed by the Air Force and Navy was to the Coast Guard only, and not to the American Oil Company and the AMOCO VIRGINIA. This decision disregards the public duty or public status disqualification which has been a part of the maritime law of salvage for more than 100 years.

In determining whether a salvor's acts are eligible for a salvage award, the question is not whether the person or agency rendering assistance owes a duty to the particular ship in peril, but is whether the person or agency rendering assistance was carrying out his authorized duties. 78 C.J.S., *Salvage*, § 33.

In *Thornton* v. *THE LIVINGSTON ROE*, *supra*, the entity seeking a salvage award was a public officer, in this instance, a U. S. naval officer who assisted in extinguishing a fire on board a Standard Oil Company tanker in Recife, Brazil. The court held in this case that the naval officer was disqualified to receive a salvage award because he acted in the performance of his public duty as a naval officer of the United States.

In describing the "public duty disqualification", Judge Medina in the *Thornton* case specifically recognized that the

public duty disqualification bars a claim for salvage *"even in a case where there is no duty to the ship."* (p. 344) The court declared (p. 344):

> "Courts have long held that public officers who render salvage services to individuals in the course of performing their public duties may not be awarded salvage. (citations omitted) This disqualification does not encompass all salvage services rendered by public officers. Analysis of the cases indicates that it is applicable when the salvage services are in the circumstances within the scope of the duties enjoined by law, regulations, directives, or within the scope of those duties implied from the nature of the particular public service involved. In other words, *the question is whether the operation for which the salvage is claimed is one which the individual or group was expected to perform as a result of his or its public status.*" (Emphasis added)

Tracking the wording of the Court in the *Thornton* case, the actions of the Air Force and Navy in assisting in the fire-fighting effort and in furnishing foam and services to the Coast Guard at the Coast Guard's request, were within the line of their duties "enjoined by laws, regulations, and directives, or within the scope of those duties implied from the nature of the particular public service involved," and were operations which they were "expected to perform as a result of their public status".

C. The case presents an important Federal question which has not been decided by this Court.

Petitioner, a citizen of the United States and owner of an American vessel (AMOCO VIRGINIA) paid its taxes to the United States Government to be used by the Government for public purposes. Congress has established the

Coast Guard to aid and assist vessels such as the AMOCO VIRGINIA when in distress. Heretofore, the lower Federal Courts have ruled that the Coast Guard is ineligible to receive salvage awards for services rendered in performing its authorized functions and duties. The question in this case is whether the United States is entitled to a salvage award for expenses for services and supplies furnished by the Air Force and Navy to the Coast Guard at the Coast Guard's request, with such services and supplies being utilized by the Coast Guard to save property on the navigable waters of the United States. This question, which has not been decided by this Court, is very important to the American Merchant Marine, and petitioner urges this Court to rule on this matter.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26455

In the Matter of the Libel and Petition of the AMERICAN OIL COMPANY, as owner of the SS AMOCO VIRGINIA, her engines, tackle, apparel, etc., in a cause of exoneration from or limitation of liability.

UNITED STATES OF AMERICA,

Claimant and Plaintiff-Appellant,

v.

AMERICAN OIL COMPANY, as owner of a cargo of gasoline and heating oil formerly laden on the SS AMOCO VIRGINIA, in personam,

Libelant and Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(OCTOBER 3, 1969)

Before TUTTLE and GEWIN, Circuit Judges, and COMISKEY, District Judge.

COMISKEY, District Judge: The United States of America claims a salvage award on principles of maritime law. The lower court denied the salvor's claim. We reverse.

The S.S. AMOCO VIRGINIA was a steel hulled tank vessel of about 12,527 gross tons, approximately 571 feet in length owned by the American Oil Company. Just after midnight on Sunday, November 8, 1959 she was moored to the dock of the Hess Terminal Corporation, in the Houston Ship Channel near Galena Park, Texas. In this berth she was loading a cargo of gasoline and heating oil. She was almost fully laden with more than six million gallons of this cargo, when a fire ignited on the surface of the water in the vicinity of her berth. The flames quickly spread surrounding the vessel and some of her barges moored alongside. One of her barges exploded, propelling flaming gasoline onto the vessel. Explosions followed in some of her cargo tanks. Fire spread over other portions of the ship, igniting portions of her cargo, and flames licked as high as her masts. Those on board the vessel were unable to fight the fire with her firefighting systems. Several crew members were killed. The vessel and her cargo lay burning out of control with grave danger of explosion. The adjacent docks stood threatened with a major disaster. The Houston Ship Channel was ordered closed by the U. S. Coast Guard. Fire departments from the City of Houston and eighteen other municipalities joined in the fight to stop the fire along with a fireboat from the Houston Navigation District, three Coast Guard picket boats assigned to the Captain of the Port, Coast Guard personnel and equipment from the Captain of the Port, and fire parties from a Coast Guard Base and from various Coast Guard vessels in Galveston, Texas, and Sabine Pass. As morning arrived, the fire fighting had exhausted the chemical foam required to extinguish a fuel fire of this sort. The foamite supply used up to this time had come from the Coast Guard, Hess Terminal Corpora-

tion, the Houston Fire Department, the Houston Navigation District, and private industries along this area of the Houston Ship Channel. Now it was seven o'clock in the morning and the fire was almost under control. All of the chemical foam needed to fight this fuel fire was gone. Suddenly, the fire built up again, regained in power, and surpassed the intensity of the conflagration that the firefighters had conquered during the dark and dawning morning hours. A series of explosions occurred, and a new major fire-fighting effort was demanded. But there was no chemical foam left. The firefighters had no weapons with which to fight.

However, foam to fight was on its way. At about 7:00 A.M. the U. S. Air Force at Ellington Air Force Base sent ten 55-gallon drums of foam to the scene and another ten barrels at 9:30 A.M. The Coast Guard Houston Port Captain, with approval from the Eighth Coast Guard District office in New Orleans, bought more chemical foam from commercial sources. A veritable air lift was begun to bring foam into Houston through Ellington Air Force Base with the first plane in the airlift arriving at Ellington at 11:59 A.M. Later that afternoon Air Force and Navy aircraft arrived with foam at almost ten minute intervals. This foam air lift continued for seven hours, stopping at about 7:00 P.M. when the Houston Civil Defense spokesman advised no further need for foam. The fire had been brought for the second — but final —time under control. This foam air lift consisted of 47 flight, hauled more than a half million pounds of foam, involved more than 400 Air Force and Navy personnel, and used some 42 Air Force and Navy vehicles.

The lower court found that,

> "[I]t would have been impossible to put out the fire at the time it was extinguished without the cooperation of the U. S. Air Force and Navy. . . .

> [t]he value of the S. S. AMOCO VIRGINIA after the fire was extinguished, was $415,000.00 . . . and the value of her cargo was $491,326.72. . . .
>
> [t]he efforts of the Air Force and Navy were a contributing factor in preserving more than $900,000.00 worth of property for the benefit of the American Oil Company. . . ."

The district judge further found that,

> "[t]he only actual expenses incurred by the Air Force and Navy . . . in furnishing foam to the scene of the fire was $35,641.20, representing the cost of the foam which was furnished to the scene of the fire, and $90.00 in lost equipment."[1]

The Court, however, rejected the salvor's claim for the $35,641.20 on the principle that "the United States of America as sovereign has no inherent right to recover for salvage services under the general maritime law"[2]

The lower court further denied the other claims of the salvor as follows:

$51,129.36	— Transportation costs, military air-craft, 47 flights for 123.59 hours.
2,168.23	— Military personnel
296.62	— Transportation costs, military vehicles
351.19	— Civilian personnel cost
$54,035.40	

In rejecting these other salvage claims of the United States of America the Court barred their recovery on the further grounds that the Government failed to carry the burden of proving to what extent its salvage efforts "contributed to preserving the S.S. AMOCO VIRGINIA and its cargo. . . ."[3]

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[1] Findings of Fact and Conclusions of Law — Record on Appeal p. 590.
[2] *Id.* at 592.
[3] *Id.* at 594.

The plaintiff makes its claim for salvage under the general maritime and admiralty law of the United States of America. The claim fits the salvage — maritime law requirements, i.e. the S. S. AMOCO VIRGINIA disaster was a "maritime peril from which the ship [and its cargo] . . . could not have been rescued without the salvor's assistance. . . . The act must be successful in saving, or in helping to save, at least a part of the property at risk."[4] As stated by the Supreme Court in *The Blackwall,* 77 U.S. (10 Wall.) 1, 12 (1869), "Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea. . . . Success is essential to the claim. . . . More than one set of salvors, however, may contribute to the result, and in such cases all who engaged in the enterprise and materially contributed in the saving of the property, are entitled to share in the reward which the Law allows. . . ." The remaining requirement to sustain this salvage claim is that "[t]he salvor's act must be voluntary, that is, he must be under no official or legal duty to render the assistance." *Gilmore & Black, supra; Davey* v. *The Mary Frost,* Fed. Cas. 11 (E.D.E.D. Texas — 1876); *Thornton* v. *The Livingston Row,* 90 F.Supp. 342 (S.D.N.Y. 1950). It is on this legal point that the American Oil Company resists the salvage claim. It argues that the salvage services

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[4] Gilmore & Black, The Law of Admiralty p. 445; Robinson, Admiralty 709 (1939); 1 Benedict, Admiralty f 117 (6th ed. 1940); 1 Norris; The Law of Seaman f 183 (1952); Kennedy the Law of Civil Salvage (3 ed. 1936) p. 2

Findings of Fact, paragraph 12 — "Although I find it would have been impossible to put out the fire at the time it was extinguished without the cooperation of the U. S. Air Force and Navy, pursuant to the Coast Guard's request therefor, ... I find that the efforts of the Air Force and Navy were a contributing factor in preserving more than $900,000.00 worth of property for the benefit of the American Oil Company ....."

rendered by the United States Coast Guard represented nothing more than a fulfillment of its pre-existing legal duty to render such services to a vessel in distress. We adopt the findings of the lower court and agree with the American Oil Company that the salvage services rendered herein were the acts and services of the United States Coast Guard. In rendering such services, however, the United States Coast Guard did solicit and receive valuable service and support from the United States Air Force and from the United States Navy, as well as from commercial sources.

In the first place, it should be remembered that the claim of the United States for salvage does not include any costs for the U. S. Coast Guard, but only covers items of cost for the United States Air Force and the United States Navy. The National Government makes its own policy in deciding when it will make a claim for salvage and when it will not.[5] In this case, then, the National Government has apparently concluded as a matter of policy to make a salvage claim for services rendered by the U. S. Coast Guard to the extent, and only to the extent, that the Coast Guard used the services and supplies of the Air Force and

[5] "It is settled doctrine that nothing prevents a government from claiming salvage, whether the service was performed by a Navy vessel or a government-owned merchant ship. The United States usually does not claim an award but that is a matter of policy and has nothing to do with legal right. In The Impoco, Judge Ward wrote:

> '. . . the United States relies upon its inherent right as an owner to recover compensation for salvage services in accordance with the ancient doctrine of the maritime law. Such services are voluntary and they are just as voluntary in the case of men of war and public vessels generally as they are in the case of private vessels; i.e. it is no part of their duty to render such services. While I can see that a sovereign would and perhaps should consider it beneath his dignity to ask for compensation for saving property at sea, I can imagine no legal reason to prevent him from doing so.' " Gilmore & Black, The Law of Admiralty, p. 455

Navy. This does not mean that the Coast Guard has no right to salvage for its own services and supplies. The pre-existing duty bar to salvage by the U. S. Coast Guard has not been sustained by the Courts.

The establishment and duties of the Coast Guard are found in the United States Code, Title 14, Part I. 14 U.S.C. §2 sets out the primary duties of the Coast Guard — the enforcement of federal laws on the high seas, promotion of safety of life and property on the high seas, maintenance of aids to maritime navigation and rescue facilities for the promotion of safety on the high seas, and availability as a specialized service for the Navy in time of war. Particularly, 14 U.S.C. §88 directs itself to the job of the Coast Guard in the saving of life and property. The pertinent part of this statute applicable to the facts of our case reads as follows:

> (a) In order to render aid to distressed persons, [and] vessels . . . on the high seas and on waters over which the United States has jurisdiction . . . the Coast Guard may:
>
> (1) Perform any and all acts necessary to rescue and aid persons and protect and save property;
>
> * * * *
>
> (b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized."

Reading the words of the statute as they are written, we find that the Coast Guard's power to render fire fighting services within the context of this case is a permissive function. The statute says the Coast Guard *may* perform these functions. The permissiveness of the Coast Guard's

function was recognized in *United States* v. *DeVane*, 306 F.2d 182, 186 (5th Cir. 1962):

> "The position of the government, with which we agree, is that *Gavagan* went no further than affirming what is clear from the statutes — that the decision to undertake or abandon a rescue is discretionary with the Coast Guard and the other government agencies who participate in the National SAR plan."

Again in *Frank* v. *United States*, 250 F.2d 178, 180 (3rd Cir. 1957) cert. den. 356 U.S. 962 (1958) it was held:

> "[*T*]*he Coast Guard, like a private salvor, renders voluntary assistance* where no duty to help is owed the person or vessel in distress. True, it is a statutory function of the Coast Guard to establish and operate rescue facilities. 14 U.S.C. §2. Congress has also provided that the 'Coast Guard *may* render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.' 14 U.S.C. §88(b). *But this legislation falls short of creating a duty of affirmative action owed to a person or vessel in distress.*" (Emphasis supplied.)

For other cases finding no legal duty on the part of the Coast Guard to rescue or to furnish assistance, see *United States* v. *Gavagan*, 280 F.2d 319, 328 (5th Cir. 1960), cert. denied 364 U.S. 933 (1961); *United States* v. *Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195 (1st Cir. 1967), cert. denied 389 U.S. 836 (1967). Accordingly, we conclude that there was no pre-existing legal duty which compelled the Coast Guard to render the firefighting and salvage services in this case. This same permissiveness finds its way into the publication issued by the United States Coast Guard, C.G.-239, dated July 1, 1958 entitled "Security of Vessels and Waterfront Facilities". The record shows that

these regulations set out the duties of the Captain of the Port which in this case applied to Coast Guard Commander of the Port of Houston. Paragraph 12-8 from the *Manual for Port Security* reads as follows:

> "Paragraph 12-8. Fire-fighting equipment is provided for the purpose of protecting Coast Guard property. Fire protection for private and commercial waterfront facilities is a responsibility of fire protection officials of the community. *However, when Coast Guard equipment* is available it *may* be utilized to assist the *efforts of the local fire officials.*" Ex. Vol. 42-44).

Despite the permissiveness of the Coast Guard's efforts, the United States of America, as a matter of policy, has elected not to make a claim for salvage on behalf of the Coast Guard. However, to the extent that the Coast Guard obtained services and supplies from the United States Air Force and the United States Navy, the government does assert a salvage claim. Salvage claims by these two military branches are not unusual, as the lower court correctly observed in its findings:

> Congress has expressly authorized claims for salvage services performed by the Air Force and the Navy, 10 U.S.C. Sec. 7365, 9804. As to the Air Force, Congress has provided (10 U.S.C. Sec. 9804):
>
> > Under the direction of the Secretary of Defense, the Secretary of the Air Force may settle or compromise and receive payment of a claim by the United States for salvage services performed by the Department of the Air Force for any vessel.
>
> As to the Navy, Congress has similarly provided (10 U.S.C. Sec. 7365):
>
> > The Secretary of the Navy, or his designee, may consider, ascertain, adjust, determine, compromise,

> or settle and receive payment of any claim by the United States for salvage services rendered by the Department of the Navy to any vessel.

The American Oil Company also argues that since the United States Air Force and the United States Navy could not legally refuse to respond to the Coast Guard's request for services and supplies, and therefore, the expenses of the Air Force and Navy should not be recovered. Assuming, arguendo, that these two military forces were legally bound to service the Coast Guard with assistance, it does not follow that the United States of America should be barred from recovery for the services rendered. If nothing else, the alleged pre-existing legal duty on the part of the Air Force and Navy would be owed to the United States Coast Guard, and not to the American Oil Company. The pre-existing duty which can disqualify a salvor from recovering must run between the salvor and the owner of the vessel and cargo salvaged.

Finally, the American Oil Company resists the salvage claim on one remaining ground. American urges that the United States Air Force and the United States Navy should be disqualified for the salvage service claim because its efforts were rendered pursuant to the National Search and Rescue Plan. The National Search and Rescue plan represents the result of the President's Air Coordinating Committee to implement recommendations of the civil air policy, May 1954, which stated the following:

> "To provide an overall search and rescue plan for effective utilization of all available facilities to include provisions for the control and coordination of all type of search and rescue."

The plan was jointly signed and adopted March 30, 1956 by the Secretary of the Treasury, Secretary of Defense,

Secretary of Commerce, Federal Communications Commission, and Civil Aeronautics Board. A copy of the National Search and Rescue Plan, commonly known as SAR, is in the record. (Respondent Exhibit #26) An outlining of the plan is found in Chief Judge Brown's opinion in *United States* v. *Gavagan,* 280 F.2d 319, at 322 (5th Cir. 1960). Briefly, the Plan is intended to effectively utilize all facilities for search and rescue missions, to render aid to persons and property in distress, to coordinate efforts under a single federal agency for the sake of efficiency and economy. The SAR plan, however, recognizes the statutory role of the United States Coast Guard for the promotion of safety on the high seas and inland waters. The SAR Plan divides the planet earth into three regions, namely, inland region, maritime region, and the overseas region. The Coast Guard is named as the regional SAR coordinatory for the maritime region, which includes the Houston Ship Channel. The Plan goes on to outline the organization of the SAR network and the conduct of its operations. Two sections of the SAR plan are relevant to this case:

> 6d.(2) Agreements between a Regional SAR Coordinator and the Army, Navy, Air Force, JCS Unified Command, or Coast Guard will provide for the fullest practicable utilization of the facilities of such agencies in regional SAR missions under the Regional SAR Coordinator, *consistent with the statutory responsibilities and authorities and assigned functions of such agencies,* and will provide that such agencies delegate to the Regional SAR Coordinator or authority for the coordination of their facilities committed to such missions. (Emphasis added)
>
> 6f.(6) *This plan does not encompass SAR for such activities as: salvage operations,* submarine rescue spe-

> cial or unusual operations of the Armed Forces, emergencies affecting public welfare occurring as a result of enemy attack, insurrections, civil disturbances, earthquake, fire, flood, or other public disasters or equivalent emergencies which endanger life and property or disrupt the usual process of government. However, the SAR organization and its facilities should be utilized to the maximum extent feasible in connection with the above activities.

In Paragraph 6d.(2) above, it is obvious that the SAR Plan did not intend to change the "statutory responsibilities" of the United States Coast Guard with regard to its functioning under this Plan. The permissive duty of the Coast Guard (14 USC § 88) is clearly still the law for this case and the SAR Plan never intended to change it. Further, Paragraph 6f.(6) above exempted the plan from salvage operations. This reasoning is buttressed by the quote supra from the *DeVane* case which we repeat because of its reference to the SAR Plan.

> "The position of the government, with which we agree, is that *Gavagan* went no futher than affirming what is clear from the statutes — that the decision to undertake or abandon a rescue is discretionary with the Coast Guard and the other government agencies who participate in the National SAR Plan."

Accordingly, the salvage claim of the National Government cannot be defeated because its Coast Guard is part of the SAR Plan. The SAR Plan imposes no extra statutory pre-existing legal duty on the Coast Guard. The SAR Plan recognizes the "statutory responsibilities" of the Coast Guard which, as we have found, are permissive.

Accordingly, the amount of the salvage award found by the lower court in the sum of $89,676.60, but denied

to the National Government on legal grounds, should be entered as a judgment for the appellant. The judgment of the lower court is reversed and remanded with directions to enter judgment as set out herein.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(OCTOBER TERM, 1968)

No. 26455

D. C. Docket No. ADM. 1827 and 2003 (Consolidated)

In the Matter of the Libel and Petition of the AMERICAN OIL COMPANY, as owner of the SS AMOCO VIRGINIA, her engines, tackle, apparel, etc., in a cause of exoneration from or limitation of liability.

UNITED STATES OF AMERICA,

Claimant and Plaintiff-Appellant,

v.

AMERICAN OIL COMPANY, as owner of a cargo of gasoline and heating oil formerly laden on the SS AMOCO VIRGINIA, in personam,

Libelant and Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before TUTTLE and GEWIN, Circuit Judges, and COMISKEY, District Judge.

JUDGEMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to enter judgment as set out in the opinion of this Court.

It is further ordered that Libelant & Defendant-Appellee pay to Claimant & Plaintiff-Appellant, the costs on appeal to be taxed by the Clerk of this Court.

October 3, 1969

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26455

In the Matter of the Libel and Petition of the AMERICAN OIL COMPANY, as owner of the SS AMOCO VIRGINIA, her engines, tackle, apparel, etc., in a cause of exoneration from or limitation of liability.

UNITED STATES OF AMERICA,
Claimant and Plaintiff-Appellant,

v.

AMERICAN OIL COMPANY, as owner of a cargo of gasoline and heating oil formerly laden on the SS AMOCO VIRGINIA, in personam,
Libelant and Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(OCTOBER 28, 1969)

ON PETITION FOR REHEARING

Before TUTTLE and GEWIN, Circuit Judges, and COMISKEY, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Pet. for rehearing filed 10/16/69
Pet. for rehearing denied 10/28/69

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26455

In the Matter of the Libel and Petition of the AMERICAN OIL COMPANY, as owner of the SS AMOCO VIRGINIA, her engines, tackle, apparel, etc., in a cause of exoneration from or limitation of liability.

UNITED STATES OF AMERICA,

Claimant and Plaintiff-Appellant,

v.

AMERICAN OIL COMPANY, as owner of a cargo of gasoline and heating oil formerly laden on the SS AMOCO VIRGINIA, in personam,

Libelant and Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(NOVEMBER 28, 1969)

Before TUTTLE and GEWIN, Circuit Judges, and COMISKEY, District Judge.

PER CURIAM: Rule 37 of the Federal Rules of Appellate Procedure[1] in the circumstances of this case requires a holding with respect to interest due the United States of America.

Therefore, the last paragraph of this panel's opinion dated October 3, 1969 is hereby amended to read as follows:

> "Accordingly, the amount of the salvage award found by the lower court in the sum of $89,676.60, but denied to the National Government on legal grounds, should be entered as a judgment for the appellant with legal interest thereon from the date of entry of judgment by the lower court on remand. The judgment of the lower court is reversed and remanded with directions to enter judgment as set out herein."

---

[1] Rule 37. INTEREST ON JUDGMENTS. Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

Statutes and Regulations Involved

1.

14 U.S.C. § 2

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws upon the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on the high seas and on waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on and over the high seas and waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war. Aug. 4, 1949, c. 393, § 1, 63 Stat. 496.

2.

14 U.S.C. § 88

(a) In order to render aid to distressed persons, vessels, and aircraft on the high seas and on waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

(2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is

claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophes;

(3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and

(4) destroy or tow into port sunken or floating dangers to navigation.

(b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized. Aug. 4, 1949, c. 393, § 1, 63 Stat. 501.

3.

33 C.F.R. § 6.04-11, p. 56

The captain of the port may enlist the aid and cooperation of Federal, State, county, municipal, and private agencies to assist in the enforcement of regulations issued pursuant to this part.

4.

EXECUTIVE ORDER 10173

REGULATIONS RELATING TO THE SAFEGUARDING OF VESSELS, HARBORS, PORTS, AND WATERFRONT FACILITIES OF THE UNITED STATES

By virtue of the authority vested in me by Public Law 679, 81st Congress, 2d Session, approved August 9, 1950, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220 (50 U. S. C. 191), and as President of the United States, I hereby find that the security of the

United States is endangered by reason of subversive activity, and I hereby prescribe the following regulations relating to the safeguarding against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, of vessels, harbors, ports, and waterfront facilities in the United States, and all territory and water, continental or insular, subject to the jurisdiction of the United States, exclusive of the Canal Zone, and the said regulations shall constitute Part 6, Subchapter A, Chapter I, Title 33 of the Code of Federal Regulations; and all agencies and authorities of the Government of the United States shall, and all state and local authorities and all persons are urged to, support, conform to, and assist in the enforcement of these regulations and all supplemental regulations issued pursuant thereto:

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No. 1114

In the Supreme Court of the United States

OCTOBER TERM, 1969

AMERICAN OIL COMPANY, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1114

AMERICAN OIL COMPANY, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. App. F) are not reported. The opinion of the court of appeals (Pet. App. A) is reported at 417 F. 2d 164.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1969 (Pet. App. B). A timely petition for rehearing was denied on October 28, 1969. The petition for a writ of certiorari was filed on January 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

380-566—70

QUESTION PRESENTED

Whether the United States has a legal duty to rescue or furnish assistance to private ships on navigable waters which would disqualify the United States from recovering salvage under established principles of maritime law.

STATEMENT

1. On November 8, 1959, while the SS AMOCO VIRGINIA, a tanker owned by petitioner and engaged in loading a cargo of gasoline and heating oil, was moored in the Houston Ship Channel, a fire was ignited in some gasoline or other petroleum product on the surface of the water (R.A. 583).[1] The flames spread along the surface of the water, eventually setting fire to the ship (R.A. 583). The Houston Fire Department, other regular and volunteer fire departments from adjacent communities, a local fireboat, and three or four small United States Coast Guard picket boats responded (R.A. 378, 380, 381, 383–384, 386, 390, 409, 571; Ex. Vol. 60, 157, 229).

Approximately seven hours after the start of the fire and when it was almost under control, all available foam with which to fight the fire was exhausted (Ex. Vol. 60). The fire immediately built up again, surpassing its prior intensity (Ex. Vol. 60).

At this point, according to the Chief of the Houston Fire Department, it would have been impossible to put out the fire without foam (R.A. 375). Accordingly,

[1] The record below consists of three volumes, the last of which is an exhibit volume that is independently paginated. The first two volumes will be referred to as "R.A.", followed by a page number. Exhibits in the exhibit volume will be cited by the page at which they appear, preceded by the abbreviation: "Ex. Vol.".

had no more foam been forthcoming, the fire fighters would have been forced to withdraw from the ship and the AMOCO VIRGINIA and her cargo would have been destroyed (R.A. 376).

On that morning, Air Force Personnel at Ellington Air Force Base, near Houston, became aware of the need for additional foam (R.A. 162, 165–166, 342, 413; Ex. Vol. 51, 64). Ten drums of foam, containing 55 gallons each, were dispatched by Air Force Truck (R.A. 165–166, 198–199; Ex. Vol. 51). After the reserve supply of foam at Ellington was depleted, the base commanding officer authorized the use of aircraft to fly foam into Ellington (R.A. 242–243, 246, 258–259). By 7:00 p.m., when Houston Civil Defense authorities advised that shipments of foam could be discontinued (R.A. 434; Ex. Vol. 14, 28), the Air Force and Navy had flown 47 separate flights (Ex. Vol. 24), bringing in about 510,000 pounds of foam (Ex. Vol. 24), which was transported to the scene of the fire by various military vehicles (R.A. 261–266, 433–434). The entire operation required the services of more than 400 Air Force and Navy personnel and 42 Air Force and Navy vehicles (Ex. Vol. 45).[2]

As a result of the overall fire-fighting effort and the assistance of the Air Force and the Navy in promptly furnishing foam, the SS AMOCO VIRGINIA was

[2] In addition to the foam, a number of off-duty Air Force firemen volunteered to fight the fire, and with Air Force permission were dispatched to the scene with special fire-fighting equipment (R.A. 175–176, 188–192, 200–201, 204–208, 222, 229, 415–417, 419, 425–427). One of the volunteers was burned, temporarily blinded and hospitalized (R.A. 216–217, 219–221). There were 21 fire fighters from Ellington (R.A. 421).

saved; its value after the fire was extinguished was $415,000.00, and its cargo had a salvage value of $491,326.72 (R.A. 590). In furnishing fire-fighting supplies and assistance, the Air Force a d the Navy incurred expense of about $90,000 (R.A. 441–442, 461–462, 590; Ex. Vol. 3–23, 39–40).

2. In proceedings brought by petitioner for exoneration from or limitation of liability, the United States filed a claim for salvage services against petitioner of $95,000.00. After a trial, the district court found, *inter alia,* that

> [I]t would have been impossible to put out the fire at the time it was extinguished without the cooperation of the U.S. Air Force and Navy. * * * [Pet. App. A, p. 3.]
>
> * * * * *
>
> [t]he efforts of the Air Force and Navy were a contributing factor in preserving more than $900,000.00 worth of property for the benefit of the American Oil Company. * * * [Pet. App. A, p. 4.]

The court, however, denied the government's salvage claim on the grounds: (1) that the United States as sovereign has no right to recover under the general maritime law, (2) that the United States was under a legal duty to assist in fighting shipboard fires on the inland navigable waters of the United States, and (3) that the Air Force and Navy were required to provide assistance at the request of the Coast Guard.

The Court of Appeals for the Fifth Circuit reversed. It held that the United States could recover a salvage award and that the Coast Guard was not under a duty to render aid. The court further held,

without deciding whether the Air Force and Navy were legally bound to service the Coast Guard, that such a duty would not disqualify the salvor from recovery because the duty ran to the Coast Guard and not to the owner of the vessel and cargo salvaged.

ARGUMENT

The court of appeals correctly concluded that the Coast Guard was under no legal duty to furnish assistance in fighting the fire aboard the AMOCO VIRGINIA and that, under settled principles of maritime law, the United States was entitled to a salvage award.

The responsibility of the Coast Guard in the saving of life and property is set forth in 14 U.S.C. 88. That statute, in relevant part, provides:

> (a) In order to render aid to distressed persons, [and] vessels * * * on the high seas and on waters over which the United States has jurisdiction * * * the Coast Guard *may*:
>
> (1) perform any and all acts necessary to rescue and aid persons and protect and save property;
>
> * * * * *
>
> (b) The Coast Guard *may* render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized. [Emphasis supplied.]

As the court of appeals held, in rendering fire fighting services, the Coast Guard performs a permissive function. The discretionary nature of this activity has been frequently acknowledged by this Court and vari-

ous courts of appeals. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 ("The Coast Guard need not undertake the lighthouse service"); *Frank* v. *United States*, 250 F. 2d 178 (C.A. 3), certiorari denied, 356 U.S. 962; *United States* v. *DeVane*, 306 F. 2d 182 (C.A. 5); *United States* v. *Gavagan*, 280 F. 2d 319 (C.A. 5), certiorari denied, 364 U.S. 933; and *United States* v. *Sandra & Dennis Fishing Corp.*, 372 F. 2d 189 (C.A. 1), certiorari denied, 389 U.S. 836.[3] As the court stated in *Frank* v. *United States, supra*, 250 F. 2d at 180:

> * * * [T]he Coast Guard, like a private salvor, renders voluntary assistance where no duty to help is owed the person or vessel in distress. True, it is a statutory function of the Coast Guard to establish and operate rescue facilities. 14 U.S.C. § 2. Congress has also provided that the "Coast Guard *may* render aid to persons at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized". 14 U.S.C. § 88(b). [Emphasis supplied.]

Petitioner's other contentions also lack merit. Contrary to its assertion, the National Search and Rescue Plan does not impose any duty on the Coast Guard which disqualifies it from obtaining a salvage award. As noted by the court below, the plan did not change either the statutory responsibilities or the permissive nature of the Coast Guard's duties. See *United States* v. *Gavagan, supra*. Finally, even assuming that the

[3] Petitioner claims a conflict with *United States* v. *Central Wharf Towboat Co.*, 3 F. 2d 250 (C.A. 1). To the extent that this decision is in conflict, it was overruled by the later decision of the First Circuit in *United States* v. *Sandra & Dennis Fishing Corp.*, *supra*.

Air Force and Navy were under a legal duty to furnish aid to the Coast Guard, it does not follow that the government was disqualified from obtaining a salvage award. Any such duty runs to the Coast Guard and not to the petitioners, and, accordingly, has no bearing upon the right of the government to recoup, by means of a salvage award, the expenses it incurred in preventing a loss to petitioner's vessel and her cargo.

The United States thus was entitled to a salvage award since it was in the position of a person by whose assistance a ship and her cargo were in part saved from impending peril. See *The Blackwall,* 10 Wall. 1, 12.[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] There is no conflict between the decision of the court of appeals and this Court's decision in *United States* v. *Standard Oil Co.*, 332 U.S. 301. *Standard Oil* held that the United States is not entitled to recover in the absence of legislation in a "a situation not covered by traditionally established liabilities", 332 U.S. at 314, and does not preclude the United States from recovery on established principles of maritime law.

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